Filed 12/6/13 Cervantes v. Ontario-Montclair School Dist. CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SAVANA MARIE CERVANTES, Plaintiff and Appellant, v. ONTARIO-MONTCLAIR SCHOOL DISTRICT, Defendant and Respondent.	E057902 (Super.Ct.No. CIVRS1201479) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Savana Marie Cervantes, in propria persona, for Plaintiff and Appellant.

McCune & Harber, LLP, Stephen M. Harber and Barry Bookbinder for Defendant and Respondent.

On December 12, 2012, the trial court sustained a demurrer to plaintiff's first amended complaint without leave to amend. Plaintiff Maria Cervantes ("Cervantes") appeals from the ensuing judgment.

I

THE TRIAL COURT'S RULING

The demurrer was filed by defendant Ontario-Montclair Unified School District ("District"). It asserts four defects in the first amended complaint. The trial court sustained the demurrer on three of the stated grounds.

A. *Compliance With The Tort Claims Act.*

The District argued that the first amended complaint failed to state a cause of action because plaintiff failed to allege compliance with the claims presentation requirements of the Tort Claims Act. (Code Civ. Proc., § 430.10, subd. (e); Govt. Code, § 810-996.6.)

The trial court agreed: "The moving party is correct that nowhere in the First-Amended Complaint do the plaintiffs affirmatively allege the requisite compliance with the Tort Claims Act. Without such, a lawsuit cannot be maintained against a public entity." Accordingly, the trial court sustained the demurrer on this ground.

B. *Statute of Limitations.*

The District argued that the first amended complaint was barred by the two-year statute of limitations for negligence actions. (Code Civ. Proc., § 335.1.)

The trial court agreed: "A [negligence] cause of action is subject to the two-year statute of limitation. First-Amended Complaint alleges misconduct on the part of the moving party personnel in 2009 leading up to her alleged wrongful arrest on November 5, 2009 for her daughter's truancy. Despite the moving party having allegedly placed the daughter in home-schooling, plaintiff admits injury by reason of that arrest but did not file a Complaint until February 24th, 2012. The statute, however, expired November 5, 2011. And there is no legal authority submitted for a tolling based on plaintiffs being, quote in no condition physically or emotionally to bring any sort of actions, close quote. Sustain the demurrer based on the bar of Statute of Limitation without leave to amend."

C. *Uncertainty.*

The District argued that the allegations of the first amended complaint are uncertain.[1] (Code Civ. Proc., § 430.10, subd. (f).)

The trial court agreed: "There is also uncertainty. Guardian ad litem may not represent a minor in pro per. Case called *J.W. versus Superior Court*, a 1993 case, under 17 Cal.App.4th [958] at 965. Sustain the demurrer on those grounds as well."

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1 Although other grounds of uncertainty were argued, the trial court combined the third and fourth grounds of demurrer. The fourth ground was that "[t]he FAC fails to state a cause of action against the District because a guardian ad litem may not represent a minor in pro per." The trial court treated the issue as one of uncertainty.

II

DISCUSSION

The District points out that the plaintiff has failed to present a proper record on appeal because she did not include the complaint or first amended complaint in the notice designating the record on appeal.

It is, of course, impossible for us to review the sufficiency of the first amended complaint to state a cause of action without a copy of the document. As the District points out, the deficiency is an adequate reason to dismiss the appeal. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498-499) "It is [appellant's] obligation as appellant to present a complete record for appellate review, and in the absence of a required reporter's transcript and other documents, we presume the judgment is correct. [Citations.]" (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039.)

Nevertheless, Cervantes limits her appeal to a single issue: whether the two-year statute of limitations expired prior to the filing of the complaint.

Cervantes states that she was arrested on November 5, 2009 for her daughter's alleged truancy from school. While Cervantes was in jail, the girl's father obtained full custody of the daughter and Cervantes lost 9 months of custody of her daughter. As a result, she alleges emotional and economic stress caused by the District's actions. Plaintiff did not file her complaint until February 28, 2012.

Cervantes argues that the statute did not become actionable (i.e., it did not "accrue") until she was acquitted of the truancy charges on September 28, 2010. Her argument, which consumes half a page of her brief, is not supported by any citation of authority or discussion of case law. By her own admission, any negligence of the District occurred in 2009, and her emotional distress began with her arrest in November, 2009.

As the District points out, a cause of action generally accrues on the date of injury. "C.C.P. 312, the section introducing the limitation provisions of the Code of Civil Procedure, states that civil actions can only be commenced within the prescribed periods 'after the cause of action shall have accrued.' The cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and the obligation or liability arises, i.e., when an action may be brought. [Citations.]" (3 Witkin, Cal. Procedure (5th ed. 2008), Actions, § 493, p. 633.) Accrual of a cause of action may be postponed in certain situations. (*Id.* at §§ 496, 497.)

The District cites *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, which states the accrual rule, and its modification by the discovery rule: "The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause. [Citation.] A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her. [Citation.]" (*Id*. at p. 1109, fn. omitted.)

Plaintiff acknowledges that she was aware of the alleged negligence of District employees in 2009, of her arrest at that time, and the loss of custody of her daughter at that time. Although her cause of action arose at that time, she does not explain how her

2010 acquittal of the charges against her constitutes delayed discovery under the accrual rule. Nor does she explain her theory that her subsequent acquittal of the charges made her claim actionable beginning on the date of acquittal.

If plaintiff intended to rely on a theory of equitable tolling of the statute on grounds of her disability, she has failed to establish grounds for any applicable disability. (See generally 3 Witkin, Cal. Procedure (5th ed. 2008), Actions, § 695, pp. 914-915.)

In the absence of any such showing by plaintiff, or citation of authority, the trial court correctly found that the two-year statute of limitations for negligence applies to bar this action.

Although plaintiff initially limits the issue on appeal to the statute of limitations issue, she also argues in her opening brief that she properly filed a tort claim against the District under another name. After stating the alleged elements of a proper claim, plaintiff states: "Looking at Plaintiff's complaint, it is clear that it contained all of the required items." However, as explained above, we cannot look at the complaint because it is not in our record.

We therefore agree with the trial court and the District that plaintiff has failed to meet her burden of showing error.

III

DISPOSITION

The judgment is affirmed. Each party to bear their own costs on appeal.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.